IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR

BENCH, JAIPUR

ORDER

S.B. Civil Regular First Appeal No. 160/1987

against the judgment dated 10.02.1987 and decree dated 05.03.1987 passed in Civil Suit No. 73/1985, Smt. Samta Kumari @ Santosh & two others Vs. Smt. Rama & two others, whereby the learned District Judge decreed the suit in favour of the plaintiff-respondents.

Smt. Rama & Ors.

Versus

Smt. Samta Kumari @ Santosh & Ors.

Date of order :: September 20,2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

None present for the defendant-appellants
Mr. Nitin Jain for the plaintiff-respondents

BY THE COURT:

1. This is defendants' first appeal under Section 96 of the Code of Civil Procedure, 1908 against the judgment dated 10.02.1987 and decree dated 05.03.1987 in a suit for declaration filed by plaintiff Samta Kumari and her sons Avinash @ Narendra and Rajnish against the defendants Smt. Rama 'Rakhel' (concubine) of late Shri Shanker Lal Vaidhya

(Sharma).

2. Nobody appeared on behalf of the appellants, though on earlier occasion also, this appeal was dismissed in default of appearance by this court on 02.03.2006, but was restored on the restoration application filed through Shri Mahesh Sharma, counsel for the appellants, on 18.05.2007. Prior to dismissal in default on earlier occasion also consistently nobody appeared on behalf of the appellants though the matter was listed in the court on four occasions, namely on 21.02.2006, 22.02.2006, 24.02.2006 and 01.03.2006. Even after restoration of the appeal on 18.05.2007, again nobody appeared when this matter was taken up for hearing on Friday, i.e. 14.09.2007 and again today on Monday, i.e. 17.09.2007. On Friday, 14.09.2007, learned counsel for the respondent-plaintiffs Shri Nitin Jain argued the case ex parte. However, today on 17.09.2007, he informed the court that her client Smt. Samta Kumari has taken back her brief and he has given his no objection to her to engage any other lawyer. However, since nobody else has put in appearance on behalf of the

plaintiff-respondents, this court on the basis of the material available on the record and arguments made by Shri Nitin Jain on Friday 14.09.2007, proceeded to consider the material available on record and decide the case on merit as the appeal itself is a very old one of the year 1987 and has been pending in this court for about 20 years and therefore, this court found no justification to further prolong the matter in the face of non-appearance of any counsel on behalf of the appellants or appearance of any other lawyer even for the respondents.

3. The suit was filed by the plaintiff Samta Kumari claiming the following reliefs in the suit for declaration :-

(i) declaration to the effect that the plaintiff No. 1 is the legally wedded wife and the plaintiffs Nos. 2 and 3 are the legitimate children of the deceased Shanker Lal Sharma and that they are exclusively entitled to his movable and immovable property;

(ii) declaration that the plaintiffs are entitled to the pension, insurance money, gratuity and provident fund amount payable in respect of the said Shanker Lal;

(iii) declaration that the plaintiffs are entitled to the house

situated in the village Kundera and described in the map annexed to the plaint;

(iv) declaration that the defendants had no right what-so-ever to the aforesaid house;

(v) declaration that the defendants are not entitled to the pension, gratuity, insurance and provident fund amount of the deceased Shanker Lal;

(vi) for obtaining possession of the suit house from the defendants;

(vii) for perpetually restraining the defendants from obtaining pension, gratuity and provident fund amounts of the deceased Shanker Lal; and

(viii) for restraining the defendants from claiming service of the State Government of Rajasthan as dependents of Shanker Lal as a deceased Government employee of the said Government.

4. That apparently the disputes have arisen on account of the said person Shri Shanker Lal Vaidhya having married the

plaintiff Smt. Samta Kumari and given birth to two male children Avinash and Rajnish (plaintiff No. 2 and 3), had kept a concubine (Rakhel) Smt. Rama, the defendant No. 1, who gave birth to two daughters, defendant No. 2 and 3 Brijeshwari and Rajesh and the dispute centers around a house property at Village Kundera and other retiral benefits which accrued to the said person Shri Shanker Lal who retired from a Government service. The suit was pursued by the plaintiffs as indigent persons which was allowed by the learned trial court under Order 33 Rule 1 CPC. The plaintiffs examined P.W.1 Smt. Samta Kumari and P.W.2 Ghanshyam in support of the plaint and the defendants examined D.W.1 Rama and D.W.2 Brij Mohan Lal. The documentary evidence in the form of Ex.1 was the certified copy of the judgment of the learned Additional District Judge, Tonk dated 06.07.1972 by which the said court had dismissed the divorce petition filed by the said Shanker Lal Vaidhya against the plaintiff No. 1 Samta Kumari. Thereafter, the plaintiff No. 1 filed an application for maintenance against her husband Shanker Lal Vaidhya in the court of SDM, Sawai

Madhopur on 26.09.1972, but subsequently the parties patched up and she withdrew her application on 29.09.1975 and both the parties again started to live together. Somehow again the disputes arose between the parties and they started living separately. The plaintiff No. 1 again filed an application for maintenance under Section 125 CrPC but before the same could be decided, the said person Shanker Lal Vaidhya was murdered on 03.07.1984. It is after his death that the dispute between the present parties arose and since the defendant No. 1 was in possession of the suit house in Village Kundera and she did not permit the plaintiff No. 1 into the said house and she also claimed the retiral benefits which accrued to the said Shri Shanker Lal Vaidhya, the plaintiff had to file the present suit.

5. The learned trial court after recording the evidence decided all the issues in favour of the plaintiff and decreed the suit and inter alia also found that in fact no marriage took place between the said person Shri Shanker Lal Vaidhya and

defendant No. 1 Rama and therefore, she had no right to live in the house left by the said person Shri Shanker Lal Vaidhya. As far as the retiral benefits and insurance and provident fund money of the said person Shanker Lal Vaidhya are concerned, they were also decided in favour of the plaintiff except to the extent of provident fund, with respect to which the trial court held that right of nominee under the Provident Funds Act, 1925 is different from that under the Insurance Act and therefore, money of the provident fund would be payable to the person who is nominated to receive the same under a nomination duly made under the rules of the Provident Fund. Since the question of nomination will have to be determined by the appropriate authority of the Fund, the same was left open and in case of absence of nomination, the amount of provident fund would be payable to the plaintiffs. Otherwise the trial court held that the daughters of the defendant No. 1 Smt. Rama were illegitimate children and would not be entitled to any share in the house property as well as other movable properties belonging to Shanker Lal Vaidhya.

6. Having perused the pleadings, evidence on record and the impugned judgment, this court is of the considered opinion that the present appeal filed by the defendants deserves to be dismissed, for the following reasons.

7. That as far as status of defendant No. 1 Smt. Rama of being the legally wedded wife of Shanker Lal Vaidhya is concerned, the learned trial court has found that, in fact, no marriage between these persons took place as performance of Hindu rites for such marriage was not proved by the defendant No. 1. In the absence of the said marriage in fact having taken place, there was no question of giving any right in the house property and other movable properties to the children of the defendant No. 1 invoking Section 16 of the Hindu Marriage Act, 1955. The said provision of Section 16 of the Hindu Marriage Act brought on the statute book by Act No. 68 of 1976 w.e.f. 27.05.1976 stipulates that that marriage is null and void under Section 11, any child of such marriage who would have been

legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the said amendment in law and would be entitled to inherit to the properties of the parents only. The Hon'ble Supreme Court in the case of *Jinia Keotin & Ors. Vs. Kumar Sitaram Manjhi & Ors.* reported in (2003) 1 SCC 730 dealing with Section 16 of the said Act as amended in 1976, has held that such children born out of void or voidable marriage were not entitled to claim inheritance in ancestral coparcenary property, but entitled to claim inheritance to the properties of the parents only. But since the trial court in the present case has found that no marriage took place between the defendant No. 1 Rama and Shanker Lal, the question of applying Section 16 to the children of defendant No. 1, namely defendant No. 2 and 3, could not arise. The finding of the learned trial court on this issue, therefore, is not required to be interfered with.

8. That though the defendants have taken a ground in the memo of appeal that the house in question belonged to

defendant No. 1 Rama only and not to Shanker Lal, but no evidence was led by the defendant in this regard and therefore, the learned trial court found on the basis of oral evidence led by the plaintiffs that the house in question in Village Kundera belonged to the deceased Shanker Lal Vaidhya. The learned trial court found that in the written statement as well as in the oral testimony, the defendant herself had admitted that the house belonged to the said person Shri Shanker Lal Vaidhya. The appellant has filed an application under Order 41 Rule 27 CPC on 23.08.1989 seeking to bring on record a patta issued by Panchayat Samiti of Village Kundera of District Sawai Madhopur with regard to Misal No. 516 dated 21.03.1968 allotting a plot of land in the said village in her favour. However, the said patta does not give any description of the property so as to ascertain that the same is the house in question in the present suit. It may be relating to some different plot of land only as the said patta does not describe the plot of land also having a constructed house thereon also. Therefore, such additional evidence sought to be brought on

record in the present appeal, which was not allowed before the trial court, cannot be allowed to be taken on record at this belated stage nor the same affects in any manner the findings of the learned trial court finding the said residential house to be belonging to the said Shri Shanker Lal and after his death, who died intestate, the said house property to devolve on the plaintiffs.

9. The findings of the learned trial court that the plaintiff No. 1 being the legally wedded wife of the deceased Shanker Lal and plaintiff No. 2 and 3 only being the legitimate sons and legal heirs of the said deceased Shanker Lal were entitled to receive the arrears of salary, pension and gratuity and insurance maturity value, this court finds that there is not good reason to disturb those findings of the learned trial court. In the opinion of this court, the learned trial court has also rightly found that after verifying the nomination as per the Provident Fund Rules, if the nomination is in favour of any other person including the defendants, the present appellants, the money of

provident fund alone can be released to them as per the rules. But if no nomination is found in their favour, even that money would belong and would be liable to be disbursed to the plaintiffs. A perusal of para 61(3) of the Employees' Provident Funds Scheme, 1952 is also relevant here, which says that

> *"61(3) If a member has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid."*

In view of this provision in the Provident Funds Scheme and in view of the finding of the learned trial court that there was no marriage between the defendant No. 1 Rama and Shanker Lal Vaidhya, the nomination in favour of persons other than the plaintiffs in the provident fund shall be examined by the Provident Fund Authorities in the light of the said rule 61(3) of Provident Funds Scheme and appropriate decision will be taken.

10. With the aforesaid observations, this court finds no force in the appeal filed by the defendants and the same is

accordingly dismissed with no order as to costs.

(Dr.VINEET KOTHARI),J.

Pramod
Item No. S-1